

# DEPARTMENT OF HEALTH PROFESSIONS



## ADJUDICATION MANUAL

July, 2006

DEPARTMENT  
OF  
HEALTH PROFESSIONS

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## TABLE OF CONTENTS

CHAPTER 1	Overview	1
CHAPTER 2	Receipt of Initial Report	8
CHAPTER 3	Investigations	11
CHAPTER 4	Inspections	13
CHAPTER 5	Probable Cause Determination	15
CHAPTER 6	Experts and Consultants	18
CHAPTER 7	Informal Conferences	20
CHAPTER 8	Formal Hearings	24
CHAPTER 9	Orders	27
CHAPTER 10	Court Review of Agency Action	32
CHAPTER 11	Enforcement of Orders	35
GLOSSARY		37

## **CHAPTER 1**

### **OVERVIEW**

The Department of Health Professions ("Department") and the Health Regulatory Boards ("Boards") are required by statutory mandate to take appropriate action against practitioners or organizations to ensure the protection of the public. The general statutory mandate provides the Department with the authority to investigate possible violations of a Board's basic law (practice acts or regulations), and provides the Boards with authority to enforce these laws by revoking, suspending or restricting a license if a violation is proven.

In addition to the general statutory mandates and a Board's basic law, the disciplinary process is governed by the Virginia Administrative Process Act, Section 2.2-4000 et seq. of the Code of Virginia (1950), as amended ("Code"), the provisions of law generally applicable to the regulation of professions and occupations, and by court decisions interpreting these laws. Both the Department and the Attorney General's Office provide significant resources to support the Boards in their quasi-judicial role of hearing charges of misconduct which have been made against a regulated person or entity.

This manual is intended to outline the processes used by the Department and the Boards to meet this important responsibility and to be of assistance to those involved in the case adjudication process.

### **The Case Adjudication Process**

#### **Receiving Complaints and Reports**

Consistent with statutory duties of the Director of the Department ("Director"), all reports received by the Department that may allege misconduct are referred to the Complaint Intake Unit of the Department. All information is reviewed to determine if a violation of law or regulation may have occurred. Experience has demonstrated that hundreds of reports are made each year that do not warrant an investigation. If a report is accepted for investigation it is given a priority, recorded in the agency's computer tracking system and assigned to an investigator.

## **The Investigation**

It is the responsibility of the Department's Enforcement Division to conduct an investigation by interviewing potential witnesses, obtaining copies of relevant documents and accumulating evidence.

Due to the large number of matters to be investigated, the Department utilizes a case priority system to determine which types of cases receive the most expeditious attention. This system is based on the real or potential danger to the public health or safety, as indicated by the information provided to the Department.

Typically, an investigator will interview the source of the initial report and all witnesses or persons with pertinent information. After collecting and reviewing relevant documents, the investigator will conduct an interview with the respondent (the person being investigated or responding to a complaint). The results are fully documented as a written report, which is submitted to the appropriate Board.

Cases that document unlicensed activity are presented to the appropriate Commonwealth's Attorney for consideration of prosecution as a criminal matter. At the request of the Department, the Attorney General's Office may seek an injunction to enjoin unlicensed practice.

## **Determining Probable Cause**

Upon receipt of a report of investigation, the Board conducts a review to determine if probable cause exists and charges should be issued against the respondent. Each Board has a somewhat different procedure for making such a determination. The process used must be fair, unbiased and in compliance with law. If probable cause is found, the result is typically that a notice of informal conference is issued, or that a pre-hearing consent agreement is reached with the respondent. If probable cause is not found, the source and the respondent are so notified.

## **Summary and Mandatory Suspensions**

Under circumstances where the conduct of a respondent represents a “substantial danger to the public health or safety,” a Board may meet and summarily suspend a license, certificate or registration. If a good faith effort to assemble a quorum has failed, the Board may meet by telephone conference call. If the Board votes to suspend a license, it must also institute proceedings for a formal hearing. Therefore, in these circumstances, an informal conference is not held.

Also, the law provides for suspension of a license by the Director when a respondent has been convicted of a felony; has had his license revoked or suspended in another jurisdiction and not reinstated; has been adjudged legally incompetent; or pays for a license with a dishonored check. Lastly, under certain circumstances, a court may suspend a license for non-payment of child support.

## **Consent Orders**

A pre-hearing consent order is an agreement between a Board and a respondent to settle a case without having to conduct an informal conference or a formal hearing. Consent orders are typically offered when the respondent admits to the facts or when the issues are clear. A suggested consent order that contains findings of fact, conclusions of law, sanctions and a waiver of rights to proceedings is prepared and presented to the respondent. If, and only if, the respondent agrees to the settlement offered, the consent order may be entered. When entered, the case is closed. The benefits of this tool include a rapid settlement and avoidance of costly proceedings. While consent orders are generally offered before an informal conference or formal hearing is scheduled, they may be used anytime prior to a final order being entered.

## **Confidential Consent Agreements (CCA)**

A Confidential Consent Agreement (CCA) is a written agreement between a Board and a respondent that recognizes that the respondent engaged in minor, unintentional misconduct. A CCA is prepared, presented, and processed in the same way and has the same effect of closing a case as a consent order.

However, a CCA is not considered a disciplinary case. It is required to remain confidential but may be considered by the Board in any future disciplinary proceeding.

### **Informal Conferences**

The Virginia Administrative Process Act provides for two types of proceedings, informal fact-finding conferences and formal hearings. An informal conference is required except in a few instances specifically mandated by law (i.e., following summary suspensions and mandatory suspensions). Most allegations of misconduct are resolved after the informal conference.

At an informal conference, a special conference committee (“committee”), consisting of at least two (2) Board members, meets with the respondent accused of a violation. Prior to the convening of an informal conference, the respondent receives a notice which contains the specific allegations and violations asserted by the Board. The respondent receives all information in the possession of the committee which it may rely upon in making a decision. The source of the information that led to the investigation is notified of this session and may attend; he may be called upon to answer questions of the committee members, but is not usually required to do so. Informal conferences are open to the general public, but may be closed pursuant to the Virginia Freedom of Information Act, Section 2.2-3700 eq seq., of the Code to discuss medical/mental reports.

If the committee believes there is insufficient evidence to substantiate a violation of law or regulation, the matter is dismissed. If the committee believes there is evidence that a violation of law or regulation was committed, the committee may enter an order which contains findings of fact, conclusions of law and a disciplinary action/sanction. This usually takes the form of one or more of the following sanctions:

- place the respondent on probation with terms;
- reprimand;

- modify a previous order; and/or
- impose a monetary penalty.

Additionally, the committee may agree that suspension or revocation of the respondent's license is justified. In such case the matter may be referred to the full Board for a formal hearing, or the committee may recommend a consent order for suspension or revocation to the full Board.

At the conclusion of the informal conference, the decision of the committee is announced, fashioned in writing and served on the respondent. If an order is entered and mailed, the respondent has thirty-three (33) days to decide to accept or reject the order. Rejection of the order of the informal conference will cause the order to be vacated. When a decision is vacated, the matter is referred to a formal hearing.

An informal conference may also be conducted by an agency subordinate. Rather than issuing an order, the agency subordinate renders a recommended decision consisting of recommended findings of fact, conclusions of law, and disposition. This recommendation is then presented to the Board for final action.

### **The Formal Hearing**

Should a case be referred to a formal hearing, the process begins again with notice to the respondent. A formal hearing may be conducted by a hearing officer, a panel of the Board or the full Board. Committee members who participated in the informal conference proceeding are excluded from the subsequent formal hearing. A formal hearing is an administrative proceeding similar in many ways to a trial. It is open to the public and all parties may call witnesses and introduce evidence. The Board decides whether the accused has violated a law or regulation, and if so, it imposes disciplinary action.

At the conclusion of the hearing, the decision of the Board is announced, and a final order is served on the respondent. If the respondent wishes to contest the action, he may appeal the decision to the appropriate circuit court.

## **Judicial Review**

A respondent has the right to appeal a Board's decision to a circuit court. The circuit court may affirm the Board's decision, or suspend or set it aside and remand the matter back to the Board for further proceedings.

The respondent may further appeal the circuit court's decision, as a matter of right, to the Court of Appeals. The Court of Appeals may affirm the Board's decision, or suspend or set it aside and remand the matter to the Board. A further appeal is to the Supreme Court of Virginia, if certain conditions are satisfied.

## **Roles of Support Staff**

**The Enforcement Division** of the Department receives reports of potential violations, evaluates and records such information, conducts investigations and reports the investigative findings and evidence to the Board for a probable cause determination. The Enforcement Division also conducts inspections for the Boards of Funeral Directors and Embalmers, Pharmacy and Veterinary Medicine. Additionally, the Compliance Unit of the Enforcement Division monitors terms of probation as imposed by Board orders.

The Enforcement Division is the largest unit within the Department, handling cases for all of the Boards. Staff includes case intake analysts and compliance case managers, investigators, inspectors, and support personnel. Field investigators and inspectors are located throughout the Commonwealth.

**The Administrative Proceedings Division** of the Department is responsible for preparation of notices (specific written allegations of misconduct) provided to a respondent, presentation of facts and evidence at informal conferences and formal hearings, and preparation of orders. The Director and Deputy Director of the Administrative Proceedings Division and the Adjudication Specialists may be certified by the Office of the Attorney General to provide such legal service. In recent years, the Administrative Proceedings Division has facilitated the conduct of thousands of such proceedings.

**The Attorney General's Office** is by law the legal representative of all state agencies including the Boards. In certain cases, the Attorney General's Office will assign a prosecutor to present a matter at the administrative proceeding in lieu of Administrative Proceeding Division staff. In all instances, the Attorney General's Office remains as counsel to a Board. Board counsel, who function separately from those who prosecute cases, advise Boards on matters of law and represent Boards in court.

## **CHAPTER 2**

### **RECEIPT OF INITIAL REPORT**

All information received by the Department that indicates or alleges a possible violation of law or regulation is referred to the Complaint Intake Unit of the Enforcement Division.

The Complaint Intake Unit maintains a toll free telephone line (1-800-533-1560) in order to receive concerns and complaints and to answer questions regarding the complaint process. Information is also available via the Internet at the Department's website (<http://www.dhp.virginia.gov>).

A computerized system (License 2000) is used to track all cases investigated by the Enforcement Division.

#### **Initial Review (Case Intake)**

The Complaint Intake Analyst is responsible for determining if the information received warrants investigation. Initially, the Intake Analyst reviews the information, checks the licensure status of the subject of the report and identifies possible violations of laws or regulations. If the Intake Analyst requires additional information to make a determination, a preliminary investigation is instituted. Various types of records and documents may be obtained, interviews may be conducted by telephone, or correspondence may be generated to gather information to assist in making the initial determination.

#### **Matters which do not warrant investigation**

If the Intake Analyst determines that the information does not appear to warrant investigation, it is referred to the appropriate Board for review. If the Board concurs with the Intake Analyst's recommendation, the matter is not investigated. If the Board determines that the matter requires further investigation, it is returned to the Enforcement Division with an explanation of the Board's specific request.

The source of the information is notified by the Intake Analyst, in writing, of the determination not to investigate the case. Whenever possible, reports or complaints received which do not fall within the

Department's jurisdiction are referred elsewhere. Persons who believe they are entitled to reimbursement, restitution or damages are advised to consider pursuing their claim through civil action.

### **Matters warranting investigation**

When the Intake Analyst determines that information indicates a possible violation of law or regulation, a case is docketed for investigation. A report form is completed and the information is entered into the computer system. The License 2000 system automatically assigns a case number and links the case to the respondent's licensing information. Computer codes are also assigned which identify other information about the case such as the nature of the complaint, source category and method received. Additionally, each case is assigned a priority code ranking according to the nature and severity of the alleged violation.

### **Priority System**

A *Priority A* designation is assigned where an individual may have committed an act or is highly likely to commit an act that constitutes significant and substantial danger to the health or safety of any person. Repetition of such conduct would cause substantial harm and would warrant a **summary suspension**.

A *Priority B* designation is assigned where an individual may have committed a harmful act to another person but does not pose an imminent threat to public safety.

A *Priority C* designation is assigned where an individual may have committed an act that could be harmful or is considered substandard.

A *Priority D* designation is assigned where an individual has committed an act that does not harm the patient but may result in the loss of property or chattel, mislead a patient or causes inconvenience.

## **Processing**

The docketed case is processed by the intake staff and forwarded to the appropriate supervisor for assignment to an investigator.

The source of the information is notified, in writing, that their report will be investigated and is provided with the case number for reference purposes. The source is kept informed of the status of the case throughout the adjudicatory process unless the source was anonymous. Due to confidentiality requirements, anonymous sources are not entitled to any follow-up information regarding the disposition of their information.

## **CHAPTER 3**

### **INVESTIGATIONS**

Depending upon the nature and severity of the case, the Department will conduct either an administrative or field investigation. Administrative investigations are conducted primarily by telephone and correspondence by investigators located at the Department's central office. Field investigations are conducted by investigators based in regional units throughout the Commonwealth. Field investigations may include face-to-face interviews with the parties involved in the case as well as inspections of facilities, sites, or records.

All investigators are sworn personnel, duly authorized by the Director to conduct investigations and inspections, in accordance with Sections 54.1-2506 and 54.1-3308 of the Code, respectively.

Because cases may involve violations of criminal law, the local Commonwealth's Attorney may conduct a criminal investigation concurrent with the Department's investigation of regulatory violations. The Department's Enforcement Division may conduct a joint investigation with an office of the Commonwealth's Attorney, and the findings of the criminal investigation may be made part of the Department's investigative report.

Upon completion of either an administrative or field investigation, the investigator prepares a written report which identifies the source and respondent, describes the nature of the alleged misconduct of the respondent and cites the possible regulatory or statutory violation. The investigative report contains a summary of the investigation, documentation of the interviews conducted, and all related material evidence such as patient records, correspondence, and inspections relevant to the alleged violation. The complete investigative report is forwarded to the appropriate Board for review and probable cause determination.

Throughout the investigative process, a case is considered an “active investigative report” as defined by Section 2.2-3705.3(2) of the Code, meaning that the file is not required to be disclosed except in accordance with the Virginia Freedom of Information Act. However, once the Board has issued a notice, the respondent is provided a copy of the investigation report and any other materials the Board may rely on in making a decision.

## **CHAPTER 4**

### **INSPECTIONS**

The Director is authorized by Sections 54.1-2505(9) and 54.1-2506 of the Code to enforce a Board's statutes and regulations and to inspect any office or facility operated by, owned by or employing individuals regulated by a Board.

Inspections of facilities are a mechanism that Boards may use to ensure that practitioners are competent and are practicing in compliance with statutes and regulations. Inspections may be conducted periodically as a means to monitor the performance and competence of all practitioners whose practice is subject to inspection.

Three Boards within the Department have formal Inspection Programs:

- Funeral Directors and Embalmers;
- Pharmacy; and
- Veterinary Medicine.

The Department, in conjunction with the Boards of Funeral Directors and Embalmers, Pharmacy and Veterinary Medicine, have developed detailed Inspection Plans. These Inspection Plans establish procedures for selecting, conducting and reporting inspections of establishments licensed by the Boards. Also, the plans outline in detail the following:

- types of facilities subject to inspection (i.e., pharmacies, drug wholesalers, drug manufacturers, small animal, large animal, etc.);
- types of inspections (i.e., new/change of location, routine, reinspection, etc.);
- inspection items (i.e., sanitation, equipment, records, etc.);
- conduct of Inspectors during inspection;
- frequency of inspections;

- selection of facilities for inspection;
- inspection costs; and
- inspection report forms.

All inspection results are recorded on forms approved by the Board. Upon completion of each inspection, the Inspector will review the inspection report with the practitioner. Once the review is complete, the Inspector will have the practitioner sign the inspection report, and a copy is left with the facility. If the inspection detected any deficiencies, a compliance notice is completed by the Inspector and left with the facility. A copy of the compliance notice is to be submitted to the appropriate Board by the practitioner within fourteen (14) days of the inspection, indicating what actions have been taken to correct the deficiencies.

The Inspector forwards the inspection reports to the Deputy Director of Enforcement for review to ensure consistency of all inspection reports. Upon completion of the review, the inspection report is forwarded to the appropriate Board.

All inspection reports are reviewed by the Boards for compliance and Board action. The Board may take the following actions:

- take no action;
- request corrective action;
- request a reinspection; or
- conduct an informal conference.

## **CHAPTER 5**

### **PROBABLE CAUSE DETERMINATION**

When a Board receives the investigative report from the Enforcement Division, a preliminary review of the case is made to determine whether probable cause exists to proceed with an administrative proceeding on charges that one or more of the Board's statutes or regulations may have been violated. The initial review by Board staff is to determine if the case constitutes grounds for a possible summary suspension. Usually, these cases are specifically identified by the Enforcement Division. A summary suspension occurs when the Board determines that a substantial danger to the public health or safety exists should the respondent retain his license. If Board staff, or in some circumstances Board officers, determine the case should proceed as a possible summary suspension, the case is forwarded to the Administrative Proceedings Division. After preparation of the case for presentation, the Administrative Proceedings Division forwards the information to the Attorney General's Office for assignment and possible prosecution. If it is agreed that the information should to be presented to the Board as a possible summary suspension, the Board may meet by telephone conference call, provided a good faith effort to assemble a quorum of the Board has failed. Should the Board decide that an order be entered that summarily suspends a practitioner's license, the order is served personally on or mailed to the respondent, along with a notice of a formal hearing.

If the case is not processed as a summary suspension, Board staff may review the file for jurisdiction and completeness. If staff determines that additional information is needed, the case will be returned to the Enforcement Division with a memorandum outlining the needed information. However, the case is usually complete and, for most Boards, the staff submits the file to at least two Board members to review the report and make an independent recommendation as to probable cause.

Sometimes, a respondent or his attorney may contact staff and initiate negotiations resulting in a pre-hearing consent agreement which may be ratified by a committee, or by the full Board if suspension or

revocation is the sanction. The Board may determine that the matter should be resolved differently and may, for example, seek an expert opinion or initiate further fact-finding.

If the reviewing Board members independently conclude that there is probable cause to believe a violation of Board law or regulation has occurred, the Board will forward the case to the Administrative Proceedings Division for legal review and preparation of a notice of informal conference. In certain circumstances, the Board may request that an Assistant Attorney General review and approve the notice prior to conducting the informal conference.

The Board of Nursing has developed a policy wherein Board staff, who are professional nurses, are given the authority to determine if there is probable cause to initiate proceedings or action on the Board's behalf. If, after reviewing the file, the staff determines probable cause does not exist, or that the Board does not have jurisdiction over the matter in question, the staff will review the case with a Board member to determine if the case should be closed.

The Board of Medicine has developed a policy wherein the Executive Director, who is a physician, makes a preliminary determination of probable cause. The case is then reviewed with a Board member, and if probable cause is found by the Board member, the Board will initiate an action against the respondent.

Regardless of whether the initial review of the case is conducted by at least two (2) Board members or by Board staff, the methods and types of further action available to Boards are as follows:

- If the investigation reveals that there is no jurisdiction and/or no probable cause, the complaint may be dismissed and the case closed without any type of disciplinary action taken against the licensee.
- If the facts are complete and there is probable cause, a pre-hearing consent order may be offered to the respondent in lieu of an informal conference, but the respondent is advised that an informal conference may be requested. By agreeing to or not contesting the findings of

fact, conclusions of law and a sanction contained in the consent order, the respondent acknowledges the validity of the complaint. Once the respondent has signed and returned the consent order, it is presented for ratification to a committee, or to the full Board if the sanction is suspension or revocation. A committee or full Board, after reviewing the findings of fact, conclusions of law and sanction, may adopt, modify, or reject the consent order. A committee or full Board may also request further information from the Enforcement Division, schedule an informal conference, or dismiss and close the matter. Should a committee or full Board agree to the entry of the consent order, the case will be closed.

- If the facts are complete and there is probable cause that minor misconduct occurred, a confidential consent agreement (CCA) may be offered to the respondent pursuant to Section 54.1-2400(14) of the Code. A CCA may be offered only in cases where there is little or no injury to a patient or the public; little likelihood that the misconduct will be repeated; no gross negligence or intentional misconduct; and no likelihood of danger to the health and welfare of patients or the public. A CCA includes the factual basis of the misconduct and may cite the law and/or regulations violated. A CCA is not considered a disciplinary proceeding but is an acknowledgment by the practitioner of the validity of the complaint. The fact that a CCA has been entered into (and the contents thereof) must be kept confidential by both the Board and the respondent but may be considered by the Board in any future disciplinary proceeding.
- An informal conference (see Chapter 7) before a committee may be convened.

## **CHAPTER 6**

### **EXPERTS AND CONSULTANTS**

The scope of the Boards' regulatory authority and the range of complaints associated with it demand that Boards not only streamline the complaint review process, but also receive guidance from consultants for licensing and disciplinary matters involving specialized fields of practice.

A Board may contract with an expert in a particular specialty to review the investigative file and, if necessary, to testify on behalf of the Board in an administrative or court proceeding arising from the matter. An expert assists the staff in understanding the standard of practice in the specialty, and in evaluating the evidence to determine whether a practitioner performed in accordance with that standard.

Section 54.1-2502 of the Code permits the Department to establish a roster of consultants or experts in health care specialties for each Board and to enter into contracts with experts. The Director will execute contracts with consultants or experts on behalf of all Boards in the Department, except for the Board of Medicine, which holds authority pursuant to Section 54.1-2925 of the Code to contract with an expert through its Executive Director. Individual Boards are responsible for payment of any fees charged by experts for their services.

Experts customarily are selected from lists of specialists compiled by the respective specialty professional societies and are typically located in a geographical area different from where the complaint originated. Generally, an expert is limited to reviewing the material contained in the investigative file and does not interview the respondent.

The contract with the expert provides that the expert will:

- be available to work with a Department investigator to develop and present evidence of the alleged violation;

- review and evaluate a completed investigative report and other supporting material indicating the standard of practice rendered by the subject practitioner in treating patients;
- render in writing a well-documented expert opinion regarding the standard of practice provided by the subject practitioner on a patient-by-patient basis;
- assist the staff in preparing for any disciplinary proceedings which are brought against the subject practitioner by the Board; and
- provide expert testimony on behalf of the Board in any administrative or court proceeding arising from the matter.

The Board of Medicine is an example of a Board which often utilizes experts. Composed of 18 members with broad regulatory authority over the healing arts, the Board of Medicine routinely consults professionals in the various subspecialties of medicine, as well as chiropractic, podiatry and physical therapy.

When the terms and conditions of a Board order require psychiatric consultation, or when a respondent's mental or emotional condition is otherwise an issue before the Board, a Board may rely upon a psychiatric consultant. Consultants are often utilized in cases of impairment, sexual misconduct or in other circumstances that contribute to incompetent practice. Consultants communicate with the practitioner treating the respondent, evaluate the respondent's progress, and report periodically to the Board with recommendations for reinstatement of the license or further disciplinary action.

## **CHAPTER 7**

### **INFORMAL CONFERENCES**

Informal conferences, as described in Sections 2.2-4019, 2.2-4021 and 54.1-2400(10) of the Code, provide for case adjudication without the formalities of a trial-like procedure. These conferences are public proceedings, held before a committee of the Board, and are intended to obtain additional information to assist in the resolution of the matter. The informal conference gives the respondent the opportunity to discuss with the committee allegations stated in the Board's notice and evidence contained in the investigative file. The committee action usually takes one of the following forms:

- the committee orders the respondent to undergo a psychological/chemical dependency evaluation if there is probable cause to believe that he may be unable to practice with reasonable skill and safety to patients because of excessive use of alcohol or drugs or physical or mental illness. The informal conference will be reconvened upon receipt of the evaluation to take further action.
- the committee offers a consent order, if the evidence warrants suspension or revocation of the respondent's license, which the respondent may accept. If accepted by the respondent and ratified by the Board, the consent order will resolve the matter without the need for further administrative proceedings;
- the committee enters an order imposing a sanction, such as a reprimand, probation, and/or monetary penalty;
- the committee dismisses and closes the case;
- the committee modifies a previous order;
- the committee reinstates the practitioner; or
- the committee refers for a formal hearing.

Informal conferences offer a timely, less costly, less adversarial means of adjudication, and most cases are resolved at this level. Respondents have the following rights with respect to informal conferences:

- to receive reasonable notice of the date, time, and location of the proceeding and the allegation(s);
- to receive reasonable notice of the allegations of misconduct;
- to receive copies of all documentation or information on which the committee may rely in making its decision; and
- to be informed, briefly and in writing, of the action that the committee is authorized to take.

The respondent may choose to be represented by counsel at the informal conference. The Administrative Proceedings Division will assign an Adjudication Specialist to prepare the case for the informal conference, and the Board may choose to have a prosecuting Assistant Attorney General assigned to the case and to attend the proceeding. Staff's function at an informal conference in public session is to assist Board members to determine whether the allegations are supported by the evidence and to take minutes.

The venue requirements for informal conferences are stated in Sections 2.2-4003 and 8.01-261(1)(b) of the Code. Venue means the particular city, county, or geographical location in which the case may be heard and determined. Any objection to a particular location is waived if not raised prior to the conference.

Board members participating on a committee for informal conference proceedings may be chosen based on their field of interest, their location or their representation of specific disciplines within the practice. Committee members who participate in an informal conference proceeding may not participate in any subsequent formal hearing regarding the same matter, as they are considered "tainted." The disqualifying factor is not a general knowledge, but rather a particular personal knowledge of the facts of the

case as presented at the informal conference proceeding, beyond which the Board as a whole is aware. Committee members are disqualified only if they have met with the respondent.

Following the discussion of the allegations with the respondent, the committee may recess in executive session with the staff to discuss the allegations and evidence in the investigative file and presented at the conference. In executive session, staff's function is solely limited to assisting the committee in developing the order. Staff should not advocate any specific finding or sanction. It is the responsibility of the committee to determine if a violation has occurred by applying the statutes and regulations to the factual evidence. Upon returning to open session, the committee makes a motion which embodies its findings, with the same information to be put in written form and mailed to the respondent. The respondent must also be advised of the appeal process in the order.

When an order is entered and mailed, the respondent has thirty-three (33) days to advise the Board, in writing, of his challenge to the decision and request for a formal hearing. When a consent order is offered, the respondent may accept, submit a counter-offer, or reject it and exercise his right to a formal hearing. If the consent order is accepted and ratified by the Board, the case will be closed when the consent order is entered. If the respondent rejects the consent order or fails to respond in a timely manner or negotiate in good faith, the committee will vacate its recommendation and refer the case to the Board for a formal hearing.

Terms and conditions of probation appropriate to the violation are implemented by Boards to be remedial and to encourage the practitioner's further education or rehabilitation.

An informal conference may also be conducted by an agency subordinate pursuant to Sections 2.2-4019 and 54.1-2400(10) of the Code. An agency subordinate will conduct informal conferences and render a recommended decision, similar to a hearing officer. An informal conference conducted by an agency subordinate is generally similar to one conducted by a Board committee. The agency subordinate has 90

days within which to render her recommended findings of fact, conclusions of law, and decision. This recommendation is then sent to the respondent and presented to the Board for final action. The respondent may submit objections to the recommended decision. If the respondent appeared at the informal conference, he may appeal the Board's decision to a formal hearing. If the respondent did not appear, appeal of the Board's order lies to the appropriate circuit court.

## **CHAPTER 8**

### **FORMAL HEARINGS**

The purpose of formal hearings, as described in Sections 2.2-4020, 2.2-4021 and 54.1-110 of the Code, is to take evidence upon relevant factual issues through an adversarial, trial-like process. This type of proceeding must be conducted when it is required by the basic law, or when the informal procedures under Sections 2.2-4019 and 2.2-4021 of the Code were not utilized or failed to dispose of a case by consent order or order pursuant to Section 54.1-2400(10) of the Code. Formal hearings are required following summary suspensions and mandatory suspensions. However, following a summary suspension, a respondent may consent to the continued suspension of his license and forgo a formal hearing.

Formal hearings may be convened even though a respondent's license has expired or was surrendered. The unilateral surrender of a license does not deprive a Board of the authority to conduct a formal hearing and to render appropriate sanctions against a respondent.

Parties to a formal hearing are provided with the following rights, as detailed in Section 2.2-4020 of the Code:

- to receive reasonable notice of the date, time, place, and nature of the hearing. "Reasonable notice" is generally interpreted to mean thirty (30) days prior to the date of the hearing;
- to have notice of the basic law or laws under which the Board contemplates its possible exercise of authority;
- to have notice of the matters of fact and law asserted or questioned by the Board as contained in the Statement of Particulars;
- to be accompanied and represented by counsel; and

- to subpoena witnesses and documents; to submit oral and documentary evidence and rebuttal proofs; to conduct cross-examination; and to have the proceedings completed and a decision made with dispatch.

As with an informal conference, prior to the Board issuing a notice, an Adjudication Specialist will review the record and prepare a notice. Subsequent to this review, the case will be forwarded to the Attorney General's Office for assignment to an Assistant Attorney General for review and approval of the notice. Once approved, the case is ready to be scheduled for a formal hearing. The Assistant Attorney General may retain the case for prosecution on behalf of the Commonwealth, or refer the matter back to the Department for presentation by the Adjudication Specialist pursuant to Section 2.2-509 of the Code.

A Board must demonstrate that reasonable notice of the hearing is provided to all parties. This requirement may be fulfilled by sending notice both by certified mail and regular mail to the parties' address of record. In some cases, an investigator or sheriff may serve the notice on the party at their place of business or residence. This personal notice usually occurs in the case of a summary suspension.

As with informal proceedings, the venue requirements for formal hearings are stated in Sections 2.2-4003 and 8.01-261(1)(b) of the Code. Any objection to a particular location is waived if it is not raised prior to the hearing.

A formal hearing may be conducted before a quorum or a panel of the Board, pursuant to Section 54.1-2400(11) of the Code. The presiding officer at a formal hearing is a Board member designated for that purpose. The presiding Board member is empowered to administer oaths, receive evidence, subpoena testimony or produce documents, and regulate and expedite the course of the formal hearing with the assistance of an Assistant Attorney General who serves as counsel for the Board.

At a formal hearing, preliminary motions may be made, opening statements summarizing the facts may be given, testimony may be taken by both direct examination and cross-examination of witnesses called

on behalf of the Commonwealth and the respondent, documentation may be offered for the record, and parties may make a closing statement to the Board. All evidence is transcribed by a court reporter to establish a formal record of the proceeding.

At the conclusion of all testimony, the Board will enter executive session to make findings of fact, conclusions of law and to determine a sanction. The decision of the Board is determined by applying the relevant basic law under which the Board operates to the evidence presented in the record. Once a decision has been reached, the Board returns to open session and announces the findings of fact, conclusions of law, and the appropriate sanctions, if any. The decision is put in written form and mailed to the respondent.

As with the informal conference, sanctions for each violation may be levied separately or in combination, and may include a reprimand, a monetary penalty, probation, suspension, or revocation of a license. However, the sanction rendered at a formal hearing does not require the respondent's consent.

### **Hearing Officers**

Formal hearings may be conducted before hearing officers in the absence of the Board. When this is the case, the hearing officer becomes the presiding officer and is empowered with the same authority as the Board, except that the hearing officer may only recommend findings of fact and conclusions of law. This recommendation may be adopted by the Board subsequent to the formal hearing. In all cases, the Board retains the sole authority to render a sanction.

## **CHAPTER 9**

### **ORDERS**

A Board's disposition of a case involving violations of law or a regulation by a respondent is documented in the form of an order. An order may result from a disciplinary proceeding or from a negotiated settlement of alleged violations in lieu of further disciplinary proceedings. An order from a disciplinary proceeding, such as an informal conference or formal hearing, reflects a Board's case decision following the proceeding. An order resulting from a negotiated settlement of alleged violations, either prior to or in lieu of further disciplinary proceedings, reflects a decision agreed to by a committee or a Board and a respondent in the form of a consent order.

An order which results from an informal conference documents the decision by the committee of the Board. After reviewing the investigative report and having an opportunity to meet and discuss the alleged violations with the respondent, the committee convenes in executive session to deliberate and reach a decision in the matter. If the committee finds evidence of a violation of law or regulation which warrants disciplinary action, that decision is typically announced to the respondent at the conclusion of executive session. The committee makes findings of fact and conclusions of law, which form the basis for its sanction. These are read to the respondent following executive session and are, subsequently, provided in writing in the form of an order.

An order which results from a formal hearing represents the final decision of the Board in the matter. After all evidence in the case is presented in the formal administrative proceeding, each party is given the opportunity to submit closing argument or proposed findings of fact and conclusions of law for consideration by the Board or panel hearing the matter. The Board then convenes in executive session to deliberate and reach its final decision. If the Board finds evidence of a violation warranting disciplinary action, its decision is typically announced to the respondent after reconvening in open session. The Board may read the findings

of fact, conclusions of law, and ordered sanction (if any), and the decision is transcribed by a court reporter. Subsequent to the proceeding, a written order is provided to the respondent.

A consent order documents the negotiated settlement of alleged violations and may result from either a pre-hearing or post-hearing agreement. For example, a pre-hearing consent order may be offered by the Board prior to an informal conference, or following a summary suspension and in lieu of a formal hearing. A consent order may be offered following an informal conference in cases where the committee decides that the evidence warrants suspension or revocation, or where findings are included in the order which were not previously alleged in the notice. A consent order includes findings of fact, conclusions of law, and the action or sanction agreed to by the Board and respondent. A consent order may result from a case where the facts are admitted and the sanction is negotiated, or where the respondent neither admits nor denies the allegations as contained in the findings of fact but agrees to a sanction or specific terms of practice.

In all disciplinary matters and proceedings, the burden of proof rests with the Board to establish evidence of a violation of law or regulation which governs the practice of that respondent. With reinstatement applicants, the burden of proof rests with the applicant to establish evidence that he is safe and competent to practice.

### **Characteristics of an Order**

Orders are prepared by the Administrative Proceedings Division, using language fashioned by the Board at a disciplinary proceeding or, in the case of a negotiated consent order, agreed upon by the parties. Orders arising out of formal hearings are reviewed and approved by the Assistant Attorney General acting as Board counsel. An order is entered and becomes effective on the date it is signed. Orders following a disciplinary proceeding are typically signed by either a Board officer or a designated staff member on behalf of the Board.

Orders generally contain the following sections: an introductory section, “Findings of Fact,” “Conclusions of Law,” the “Order,” and the “Certificate of Service.” Consent orders also contain a “Consent” section indicating the respondent consents to the consent order and waives the right to proceedings pursuant to the Virginia Administrative Process Act. The introductory section includes the title and opening paragraph(s). The title identifies the Board that has jurisdiction over the case and the respondent. The opening paragraph indicates the type of proceeding held and the statutory authority for adjudicating the matter. It includes the date and location of the proceeding and whether it was recorded by a court reporter. It also identifies whether the respondent or his legal counsel was present, who prosecuted the case on behalf of the Board, and who served as the Board counsel.

The “Findings of Fact” section recites the Board’s decision upon questions of fact in the alleged matter. These findings are made after the Board has considered all the information presented in the case, including investigative report information, documentary evidence, testimony of witnesses, and explanations by the respondent. Findings of fact are typically listed in numbered paragraphs using an outline format, and state the factual findings which are supported by the evidence. The findings of fact may be identical to the allegations cited in the notice for the proceeding, or may be altered to include a contrary fact basis or additional mitigating information which supports the Board’s decision. Generally, the findings of fact should be limited to those which substantiate a Board’s disposition of the case and imposed sanction. A summary of the testimony or recitation of the evidence presented is not appropriate. While findings regarding medical or psychiatric treatments or diagnoses may be necessary in some cases, extraneous findings involving medical or psychiatric information about a respondent should not be included in the findings of fact.

The “Conclusions of Law” section contains the Board’s determination of which laws and regulations have been violated based on the findings of fact. The conclusions of law must follow the findings of fact and

specify the numbered paragraphs in the findings which constitute a violation of laws or regulations. The specific statute(s) and/or regulation(s) that were violated must be referenced in this section. Together, the findings of fact and conclusions of law state the factual and legal basis upon which a Board's decision in a case is premised.

The "Order" section documents the Board's action and sanction imposed. The Board must have the authority to take the specific disciplinary action it orders. The "Order" section may specify terms and conditions of reinstated or continued practice by a respondent and indicate possible consequences if these terms are violated. Terms may require drug testing, additional education, restitution, record-keeping requirements, or physical and psychiatric evaluations.

The final paragraphs of the order indicate that the order is a public document and provide information regarding how to appeal the Board's order. The time allowed to note an appeal begins to run on the date of service of the order.

The "Certificate of Service" section at the end of the order indicates the date and address to which the order was mailed, or "served" on, the respondent. This "Certificate of Service" complies with Section 2.2-4023 of the Code, which requires all final case decisions by the Board to be served upon the respondent by mail, unless other service arrangements are made and acknowledged in writing.

### **"Final" Orders and Appeals**

If the order has resulted from an informal conference, the order becomes "final" thirty-three (33) days after the Order is mailed to the respondent, unless a written request for a formal hearing is received by the Board during that time period. Once a timely written request for an appeal to a formal hearing is received, the order from the committee is vacated and a formal hearing before the Board or a panel thereof is scheduled and held. The order which results from the Board's decision at any subsequent formal hearing is the final decision and disposition of the case by the Board in the matter.

An order resulting from a formal hearing may also be appealed. An appeal of a Board's final order following a formal hearing must also be made within thirty-three (33) days from the date of service by mail, and is handled in the judicial system at the circuit court level. An appeal at this level must comply with the procedures in Part Two A of the Rules of the Supreme Court of Virginia, as more fully explained in the following chapter of this Manual. The order of the Board is not automatically vacated when appealed to the circuit court. However, the appealing party may request from the court a "stay" of the Board's order pending the appeal.

Final orders are matters of public record, according to Sections 2.2-4023 and 54.1-2400.2 of the Code. A copy of a final order is usually mailed to the original source of the complaint. While Board orders are made available to the public, all related disciplinary case information (such as the investigative report and accompanying records and evidence) obtained and maintained during the course of an investigation or disciplinary proceeding may be considered strictly confidential and remain unavailable to the public.

## **CHAPTER 10**

### **COURT REVIEW OF AGENCY ACTION**

Appeals from a final decision of a Board must be filed in accordance with Section 2.2-4026 et seq. of the Code, and Part Two A of the Rules of the Supreme Court. Venue of an appeal from a final decision of a Board is in the circuit court of the county or city in which the practitioner resides or regularly conducts business.

Pursuant to Sections 2.2-4026 and 2.2-4027 of the Code, a circuit court will review a case decision on appeal by a party to the case. On appeal, the burden rests upon the respondent to designate and demonstrate an error of law subject to review by the court. Such issues of law include: (1) accordance with constitutional right, power, privilege, or immunity, (2) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlements in connection with case decisions, (3) observance of required procedure where any failure is not mere harmless error, and (4) the substantiality of the evidentiary support for findings of fact. The determination of such fact issues is to be made upon the whole evidentiary record provided by the Board following a formal hearing. When considering the fact issues contained in the record, the court will take due account of the presumption of official regularity, the experience and specialized competence of the Board members, and the purposes of the basic law under which the Board has acted.

Court review is governed by the “substantial evidence” standard. This means that the court’s duty with respect to issues of fact is limited to ascertaining whether there was substantial evidence in the Board record to support the Board’s decision. The court may not second-guess the Board’s decision or substitute its judgment for that of the Board on factual issues as decided by the Board. Reversible error will not be found unless there is a clear showing of prejudice arising from the admission of such evidence, or unless it is

plain that the Board's conclusions were determined by improper evidence and that a contrary result would have been reached in its absence. Under the substantial evidence standard, therefore, the court may reject the Board's findings of fact only if, considering the record as a whole, a reasonable mind would necessarily come to a different conclusion.

Standing to appeal is governed by Section 2.2-4026 of the Code, and is permitted to any respondent subject to a case decision. The guidelines for the court's review are provided by the Rules of the Virginia Supreme Court, promulgated pursuant to Section 2.2-4026 of the Code. Rule 2A:2 requires any party appealing from a case decision to file, within thirty (30) days after entry of the final order in a case, a notice of appeal signed by the party or his counsel. The notice of appeal must be filed with the Executive Director of the Board and identify the case decision appealed from; state the names and addresses of the appellant and all other parties and their counsel, if any; specify the circuit court to which the appeal is taken; and conclude with a certificate that a copy of the notice of appeal has been mailed to each of the parties.

Rule 2A:3 requires the appellant to deliver to the Board with the notice of appeal or within thirty (30) days thereafter a transcript of the testimony. The Board must then prepare and certify the record as soon as possible after the notice of appeal and transcript is filed, and transmit the record to the clerk of the court named in the notice of appeal once it has been certified. The Board must then notify all parties in writing when the record is transmitted, naming the court to which it is transmitted. The record on appeal from the Board consists of all notices of appeal, any application or petition, all orders promulgated in the proceeding by the Board, the opinions, the transcript of the testimony, and all exhibits accepted or rejected, together with other material certified by the Board to be part of the record.

Rule 2A:4 requires that within thirty (30) days after the filing of the notice of appeal, the appellant must file a petition for appeal with the clerk of the circuit court named in the notice. The appellant is also responsible for serving a copy of the petition on the Board and every other party, designating the case

decision appealed from, specifying the errors assigned, the reasons why the case decision is deemed to be unlawful, and concluding with a specific statement of the relief requested.

Pursuant to Section 2.2-4029 of the Code, unless an error of law as defined in Section 2.2-4027 of the Code appears, the court shall dismiss the review action or affirm the Board's case decision. Where a case decision is found by the court to be not in accordance with law under Section 2.2-4027 of the Code, the court shall suspend or set it aside and remand the matter to the Board for further proceedings, if any, as the court may permit or direct in accordance with law. The judgment of the circuit court shall be subject to appeal to the Court of Appeals of Virginia, and, ultimately, the Virginia Supreme Court.

## **CHAPTER 11**

### **ENFORCEMENT OF ORDERS**

Section 54.1-2505(8) of the Code authorizes the Director to monitor the status of actions taken under the auspices of the Boards regarding complaints until the closure of each case. The Compliance Unit of the Enforcement Division is responsible for monitoring terms and conditions imposed on a respondent by Board orders and for reporting to the Board for enforcement.

#### **Receipt of Board orders imposed on respondent**

Board orders that require a licensee to comply with terms or conditions of practice or licensure (other than compliance with the Health Practitioners' Intervention Program, or "HPIP," or with some aspects that Boards have chosen to monitor themselves) are forwarded to the Compliance Unit of the Enforcement Division for monitoring.

When the order is received, the Compliance Manager will assign a Compliance Case Manager to the licensee, and the Compliance Unit will enter all terms and conditions of the order into the agency's disciplinary database (HPIP orders are entered for tracking purposes only), establish a hard-copy compliance file, and mail an initial contact letter to the sanctioned licensee.

#### **Receipt and maintenance of reports required by Board order**

The Compliance Unit will receive, review, and track receipt of all reports required by the orders. If review of reports reveals no problems, the report is filed in the compliance file.

If review necessitates follow-up, the Compliance Manager will assign the Compliance Case Manager to conduct the follow-up, or ask that a Field Inspector or Investigator be assigned.

If the follow-up involves allegations or a matter that must be considered in an informal conference, a compliance summary report number is assigned to it in the agency's disciplinary database. Upon completion

of the requested follow-up, the report or other appropriate form of communication will be forwarded to the Board.

### **Frequency of probation report**

A compliance summary report on each monitored licensee under terms and conditions established by a Board order will be conducted and forwarded to the Board when the monitored licensee is considered eligible for release from the terms of the order; as needed, on a case-by-case basis; when requested by the Board; and as otherwise specified in the order (e.g., an inspection is ordered after 18 months).

### **Termination of probation**

Approximately 60 days prior to the date the licensee might be eligible for release from the order, the Compliance Case Manager will review the file for compliance and to determine accuracy of eligibility for release and prepare a memorandum or report, as appropriate, and forward to the board for approval.

The Compliance Case Manager will notify the licensee if she or he is required to petition the Board for release from the terms of the order (e.g., when probation is for an indefinite period of time), and review of the file shows that the licensee appears eligible for release.

Upon approval by the Board of the licensee's release from the terms of the order, the Compliance Unit will close its file on the agency's database and purge its file to the Board. Board staff will notify the licensee in writing of the release from terms.

## **ADJUDICATION MANUAL - GLOSSARY**

Administrative Process Act (APA) - The procedural requirements for promulgating regulations and for deciding cases, found in Sections 2.2-4000 through 2.2-4033 of the Code. The APA supplements the basic law of the Department and the Boards.

Agency Subordinate – An individual who conducts informal conferences and renders recommended findings of fact, conclusions of law, and decisions for review by the Board.

Appellant - The party who appeals a case decision of a Board to a circuit court for review.

Appellee - On appeal, the party who argues against the setting aside or the remand of a Board decision.

Basic law - Provisions of Virginia statutes which pertain to specific Boards or the Department.

Certification - One of the forms of regulation of a profession (as opposed to licensed or permitted). Generally a lesser standard than licensure, certification may be required of all practitioners of a particular profession or only those who use a particular title.

Civil remedy - A remedy provided by a civil court (e.g., an award for damages in a malpractice lawsuit).

Committee – See special conference committee

Confidential Consent Agreement – An non-disciplinary agreement between a respondent and a Board acknowledging minor, unintentional misconduct. CCA's are strictly confidential but can be considered by a Board in future disciplinary proceedings.

Consent order – An order voluntarily agreed to by both a respondent and a Board. Sometimes called a “pre-hearing consent order” when it is offered in lieu of an informal conference or a formal hearing. Consent orders have the same effect as any order (see below).

Docket - The entry of a report into the License 2000 computer case tracking system, indicating its acceptance for formal investigation by the Enforcement Division. Includes the assignment of a case number, priority, nature, source and method codes, identification of applicable statutes and regulations, type of investigation warranted, regional assignment, and processing of a case by support staff.

Ex parte communication - A communication to or from one side only. For example, a letter about a case that is given to a Board and not given to the respondent is ex parte communication. Such communication should be avoided.

Formal hearing - A formal administrative proceeding of litigated issues before a health regulatory board, which is conducted in accordance with Sections 2.2-4020 and 2.2-4021 of the Administrative Process Act. The parties are the Department of Health Professions and the licensed/certified practitioner alleged to have violated laws or regulations governing their practice. The hearing is conducted before either the full Board, a quorum or panel of the Board, or a hearing officer. The formal hearing is a trial-like proceeding, which

includes sworn testimony, cross-examination of subpoenaed witnesses, introduction of evidence, and transcription by a court reporter.

Hearing officer - A person who is designated to preside over administrative proceedings conducted in accordance with Section 2.2-4024 of the Code, when the Board (full Board, a quorum, or a panel thereof consisting of at least five members) does not convene to conduct the hearing itself.

Informal conference - A fact-finding proceeding conducted by a special conference committee of a health regulatory board (or by an agency subordinate or hearing officer) with a respondent. It may result in one or more of the following actions: exonerate the practitioner; reinstate the practitioner; place the practitioner on probation with terms deemed appropriate; reprimand the practitioner; modify a previous order; and impose a monetary penalty. The case decision and sanction ordered at this level are final, unless they are appealed or forwarded to a formal hearing if the practitioner does not agree with the outcome.

Licensure - The act of granting licenses to engage in the practice of a profession that would otherwise be unlawful without the license. Authority is given to the respective Boards through Sections 54.1-2603, 54.1-2709, 54.1-2722, 54.8-2804, 54.1-2810, 54.1-2813, 54.1-2902, 54.1-3005, 54.1-3204, 54.1-3304.1, 54.1-3506, 54.1-3606, 54.1-3706, and 54.1-3805-6 of the Code.

Notice - A statement of specific charges provided to the respondent who is the subject of a complaint. The notice states the time, place, and nature of the proceeding. Also enclosed with the notice is any information on which a Board will rely to make a case decision.

Order - A decision issued by the Department, a Board, or special conference committee of a Board, pursuant to its statutory authority, affecting the license of a practitioner licensed by the Department.

Party or parties - A person or persons having a direct interest in the subject matter or outcome of a case; one(s) who could assert a claim, make a defense, control proceedings, examine witnesses, or appeal a case decision, e.g., a respondent.

Probable cause - Reasonable cause; having more evidence for than against. A reasonable ground for belief in the existence of facts as reported.

Record of the proceeding - A preservation of the basis for a case decision; an official transcript of a formal administrative proceeding prepared during the hearing by a court reporter obtained by the relevant Board, and all evidence entered into the record during the proceeding, with findings of fact and conclusions of law.

Registration - A cataloging, or method of regulation, whereby any practitioner of a profession may be required to submit information concerning the location, nature and operation of his practice.

Respondent - The person (or facility) being investigated or responding to a complaint.

Service - The delivery of a notice of an administrative proceeding, a consent order, or an order of a Board to a party which charges the party with receipt of the document and subjects the party to the legal effect of it.

Source - The originator of a complaint, report or information. The person or entity that sets the complaint/disciplinary process into motion.

Special conference committee - A committee, composed of not less than two members of a health regulatory board, that conducts informal conferences, pursuant to Sections 2.2-4019 and 2.2-4021 of the Code.

Standing - The legal right of a party to assert or enforce legal rights and duties against another. On appeal of a Board or Department decision, the party aggrieved or claiming the unlawfulness of such decision, e.g., the respondent.

Vacate - To set aside or render void an order of a Board or an order of the Department.